

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1494
822

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA

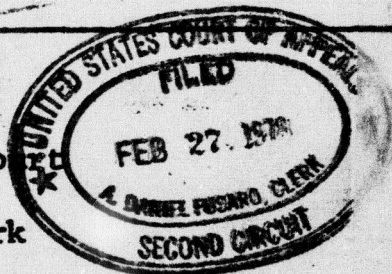
Appellee

VS

JOSEPH KOBLINSKI

Appellant

On Appeal from
The United States District Court
for the
Western District of New York



APPELLANT'S BRIEF & APPENDIX

PETRICCA AND PERFETTO
Attorneys for Appellant
Office and P. O. Address
605 Ridge Road
Lackawanna, New York 14218

822
February 21, 1978

**In The
UNITED STATES COURT OF APPEALS
For the Second Circuit**

UNITED STATES OF AMERICA

Appellee

vs

JOSEPH KOBLINSKI

Appellant

**On Appeal from
The United States District Court
for the
Western District of New York**

APPELLANT'S BRIEF & APPENDIX

**PETRICCA AND PERFETTO
Attorneys for Appellant
Office and P. O. Address
605 Ridge Road
Lackawanna, New York 14218**

February 21, 1978

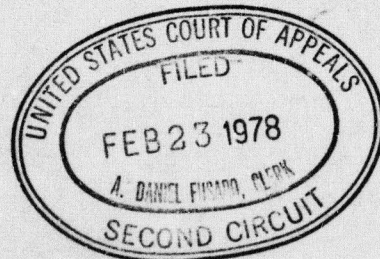


TABLE OF CONTENTS

	<u>Pages</u>
Table of Cases	i
Statutes and Authorities	iv
Questions Presented	v
Preliminary Statement	1
Statement of Facts	3
Point 1	6
Evidence that the Appellant, Joseph Koblinski agreed to obtain and supply railroad torpedos and his act of selling one railroad torpedo to Special Agent Robert Izzo should have been properly excluded. That such evidence so prejudiced the appellant that his conviction must be reversed.	
A. Evidence was not relevant to issue before the court and should have been properly excluded.	
	6
Point II..B...Evidence was of such marginal relevance that it should have been properly excluded because of its prejudicial nature and its tendency to mislead and confuse the jury	
	11
Point II.....	21
The Evidence adduced at Trial was insufficient as a matter of law to sustain the jury's verdict that the appellant was guilty of conspiracy.	
	21
Conclusion	32

TABLE OF CASES

	<u>Pages</u>
Boyd v. United States, 14 U.S. 450 12 S.Ct. 292, 35 L.Ed. 1077 (1892)	16
Brandon v. United States, 431 F 2d 1391 (2nd Circuit)	10
Bruton v. United States, 85 S.Ct. 1620, 391 U.S. 123, 20 L.Ed. 2d 476	11, 12
Burns v. United States, 286 F 2d 152	8
Glasser v. United States, 315 U.S. 60 (1942)	24
Jianelli v. United States, 95 S.Ct. 1284, 420 U.S. 770, 43 L.Ed. 2d 616	21
Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948)	16
Miller v. United States, 382 F 2d 583	21
United States v. Allison, 474 F 2d 286	8
United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965)	12, 13, 18, 19, 20
United States v. Catalano, 491 F 2d 268, (2nd Circuit 1974) cert. denied 95 S.Ct. 42, 419 U.S. 825, 42 L.Ed. 2d 48 cert. denied 419 U.S. 855 (1974)	10, 13, 16, 20
United States v. Chestnut, 533 F 2d 40 (2nd Circuit 1976)	8, 16
United States v. Ciachetti, 315 F 2d 584 (2nd Circuit 1963)	21, 26, 28
United States v. DeCicco, 435 F 2d 478 (2nd Circuit 1970)	13, 20

	<u>Pages</u>
United States v. DeNoia, 451 F 2d 979 (2nd Circuit 1971)	26
United States v. Downen, 496 F 2d 314 cert. denied 95 S.Ct. 177, 419 U.S. 897, 42 L.Ed. 2d 142	30
United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128	21, 26, 27
United States v. Flynn, 216 F 2d 354, (2nd Circuit 1954) cert. denied 348 U.S. 909 (1955)	8
United States v. Freie, 545 F 2d 1217 (9th Circuit 1970)	25
United States v. Hassell, 547 F 2d 1048	30
United States v. Kearse, 444 F 2d 62 (1971)	27
United States v. Kompinski, 373 F 2d 429 (2nd Circuit 1967)	27, 28, 30
United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975)	8, 12, 13, 16, 17, 18
United States v. Natale, 526 F 2d 1160 (2nd Circuit 1975)	19
United States v. Papadakis, 510 F 2d 287 (2nd Circuit) cert. denied 421 U.S. 950 (1975)	19
United States v. Prout, 526 F 2d 380 (5th Circuit 1963)	30
United States v. Purin, 486 F 2d 1363	26, 28
United States v. Ravich, 421 F 2d 1196 (2nd Circuit) cert. denied 400 U.S. 834 (1970)	13

	<u>Pages</u>
United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976)	10, 12, 13, 16, 20
United States v. Santiago, 528 F 2d 1130 (2nd Circuit) 19	8, 17, 18
United States v. Santore, 290 F 2d 51 (2nd Circuit 1960)	26
United States v. Sisca, 503 F 2d 1337 (2nd Circuit 1974)	27
United States v. Sperling, 506 F 2d 1323	26
United States v. Stadter, 336 F 2d 326 (2nd Circuit 1964) cert. denied 380 U.S. 945 (1965)	8
United States v. Steinberg, 525 F 2d 1126 (2nd Circuit 1975)	28, 30
United States v. Stewart, 451 F 2d 1203 (1971)	27
United States v. Stroyce, 538 F 2d 1063	31
United States v. Tramunti, 513 F 2d 1087 (2nd Circuit 1975) cert. denied 423 U.S. 832 (1975)	19
United States v. Torres, 519 F 2d 723 (2nd Circuit) 503 F 2d 1120 (2nd Circuit 1974)	16, 21, 25, 26, 27, 28

STATUTE CITED

Pages

Title 18, United States Code

§842 (a) (1) (h)

844 (a), 2 (a)

371

1, 3

Rule §402 Federal Rule of Evidence

6

Rule §403 Federal Rule of Evidence

11

OTHER SOURCES

Wharton's Criminal Evidence, Volume 4

13th Edition p. 143

6

QUESTIONS PRESENTED

1. Whether proof of similar uncharged acts are admissible to show the defendant's knowledge, intent and extent of participation in a conspiracy even if the acts are not committed in furtherance of that conspiracy.
2. Whether admission of such uncharged acts constituted an abuse of the trial courts discretion.
3. Whether the prejudicial nature of such evidence was so great and its probative value so slight that its admission constituted reversible error requiring a new trial.

PRELIMINARY STATEMENT

The appellant was indicted with four other individuals in the Western District of New York on June 26, 1976 for two counts of selling four sticks of dynamite in violation of Title 18, United States Code, Sections 842 (h) and 844 (a), one count of dealing in explosive materials without a license in violation of Title 18, United States Code, Sections 842 (a)(1), 844 (a) and 2(a) and one count of conspiracy to deal and sell explosives in violation of Title 18, United States Code, Section 371.

Defendant was tried on all four counts before the Honorable John T. Curtin and a jury. Prior to this case being submitted to the jury, The Court dismissed Count VII and Count X. Following a three day trial, the jury found the defendant not guilty of Count XII, but found him guilty of Count XIII, Conspiracy to sell and deal in explosives.

On October 27, 1977, defendant moved to set aside the verdict and for a new trial. Oral arguments held and motion denied by Court.

Thereafter, on or about November 11, 1977, imposition of sentence was suspended and defendant was placed on two year

probation. It is from this Judgment of Conviction and sentencing that defendant appeals.

STATEMENT OF FACTS

At the trial of this case, the government presented evidence that beginning on or about the 12th day of February, 1975 and continuing through the 6th day of June, 1975, several individuals named in the indictment including Joseph Koblinski were engaged in a conspiracy to deal and sell explosives, all in violation of Title 18, United States Code, Section 371.

Beginning in February, 1975, Special Agent Robert Izzo, acting in an undercover capacity, engaged a co-defendant, Thaddeus Cosnyka, Jr., in conversations relating to the sale of dynamite. At the trial of this case, Agent Izzo testified that on or about April 14, 1975, he engaged in a conversation with Thaddeus Cosnyka, relating to the sale of four sticks of dynamite which Cosnyka had in his possession and was willing to sell for \$100.00. When Agent Izzo arrived at Cosnyka's residence to consummate the sale, he was introduced to someone named "Tom" who he alleges was Joseph Koblinski. (51) Izzo testified that at that time he was suprized to see Koblinski there in that he had never had any prior dealing or conversations with him with regards to the sale of dynamite (154). Izzo testified that at the time and in Koblinski's presence, he asked Cosnyka is he had any blasting

Numbers in parentheses refer to pages in the transcript of the trial conducted on October 4, 5, 6 and 7, 1977.

caps available in addition to the dynamite and at that time Koblinski allegedly told him that he had something better than caps and produced a railroad torpedo (52). Izzo then allegedly asked if he could obtain more of the torpedos and Koblinski responded by saying that he could obtain more and would be willing to sell them at one dollar apiece (52). There were no further sales or transactions between Koblinski and Agent Izzo with regard to railroad torpedos. No other railroad torpedos were supplied or sold by Koblinski.

Izzo then testified about various conversations he had with Cosnyka between April 14, 1975 and June 5, 1975 which resulted in Izzo going to Cosnykas' home on the latter date. Izzo testified that at this time Koblinski was again present when he negotiated with Cosnyka for the sale of four sticks of dynamite. Cosnyka agreed to deliver the dynamite the next day and he advised Izzo that if he was not there, Izzo was to do business with Koblinski. Izzo then testified he turned to Koblinski and asked him if he knew what was going on. Koblinski responded that he was "cool" and would take care of business (71).

Izzo testified that the next day he returned to Cosnyka's residence and while he was talking to Cosnyka, the telephone rang. He claims he took the phone and recognized the

voice on the other end as being that of Joseph Koblinski. Izzo further testified that he asked Koblinski where he had been and Koblinski responded that he had place the dynamite under the steps of a house in front of the Cosnyka residence (78).

This was the extent of the government's case against Joseph Koblinski. The government's other principal witness, co-defendant Phillip Azzaretto categorically denied any involvement by Koblinski in any conspiracy to sell and deal in dynamite (205). Co-defendant Thaddeus B. Cosnyka testified that appellant was never involved in any scheme with regard to any sale and that his involvement was totally innocent and only as an accomodation to him (278).

The defendant attacked the credibility of Robert Izzo but did not offer other proof. Upon cross-examination, Special Agent Izzo readily admitted that he had no previous contact with the defendant prior to the April 14 meeting and that there had never been any direct sale of dynamite or exchange of monies for such sale by the defendant Joseph Koblinski (154,156).

POINT I

EVIDENCE THAT THE APPELLANT JOSEPH KOBLINSKI AGREED TO OBTAIN AN SUPPLY RAILROAD TORPEDOS AND HIS ACT OF SELLING ONE RAILROAD TORPEDO TO SPECIAL AGENT ROBERT IZZO SHOULD HAVE BEEN PROPERTY EXCLUDED. THAT SUCH EVIDENCE SO PREJUDICED THE APPELLANT THAT HIS CONVICTION MUST BE REVERSED.

A. Evidence was not relevant to issue before the court and should have been properly excluded.

Rule § 402 of the Federal Rule of Evidence 28 USCA reads as follows:

§402 - Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Problem of relevancy calls for an answer to the question whether an item of evidence, when tested by the process of legal reasoning, possess sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence necessarily turns on the existence of a rational link between the item of evidence on the matter sought to be proved. Wharton's Criminal Evidence, Volume 4, 13th Edition, page 143.

Appellant herein contends that the Trial Court erred in admitting certain evidence of his declarations and transactions with regard to the sale and supply of railroad torpedos, which were never proven to be an explosive as defined by Federal Statute and which were not alleged either in the indictment or at trial to have been part of the broad conspiracy to sell dynamite for which he was convicted.

Following a three day trial, the jury found the defendant guilty of conspiracy to deal in and sell explosives, namely dynamite in violation of Federal Statute.. That same jury returned a verdict of not guilty on Count XII of the indictment, which charged the appellant herein with the substantive count of selling four sticks of dynamite. As part of the government's case, testimony was introduced showing that appellant Koblinski offered to obtain and supply Railroad Torpedos for one Agent Izzo and in fact sold him one Railroad Torpedo. Over objection by defense counsel, the Trial Judge allowed this testimony as an indication of appellant's motive and intent to join in the unlawful conspiracy. Appellant herein contends that the Trial Court erred in admitting such evidence and that such evidence lacked the necessary probative value and so prejudiced the jury that he was denied a fair trial.

It is well settled that to be admissible, evidence must have some potential probative weight upon issue at trial. Where one is charged with a criminal act which may be innocent or guilty, according to the intent or motive with which it was done, evidence of acts, conduct or statements of the accused must be confined to the proof of those which a legitimate and direct connection with the principal issue or transaction involved at trial. United States v. Allison, 474 F 2d 286; Burns v. United States, 286 F 2d 152.

Appellant is quite aware of the general proposition that acts, conduct or statements of the accused may be proved in order to show intent, knowledge or motive to join in an unlawful enterprise. United States v. Stadter, 336 F 2d 326 (2nd Circuit 1964), cert. denied, 380 U.S. 945 (1965); United States v. Flynn, 216 F 2d 354 (2nd Circuit 1954); cert. denied 348 U.S. 909 (1955). However, as stated hereinabove, such acts, conduct or statements must have some logical, relevant connection with the matter in issue. United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Santiago, 528 F 2d 1130 (2nd Circuit); United States v. Chestnut, 533 F 2d 40 (2nd Circuit 1976).

The matter in issue herein was appellant Koblinski's

intent to join in a conspiracy to deal in and sell stolen dynamite in violation of Federal Law. The record is void of any legitimate and direct connection between Koblinski's declarations and sale of Railroad Torpedo and his intent to join and further any conspiracy to deal and sell dynamite. No where in the indictment or at trial was it alleged that appellant's declaration or acts with respect to Railroad Torpedos formed any part of the general plan or scheme to deal and sell dynamite, nor was there any allegation made or any proof offered that these railroad torpedos were "explosives" as defined by Federal Statute or that they were necessary or intended to facilitate the use of the dynamite. There was no proof herein that this single transaction or sale of a Railroad Torpedo was a necessary and integral part of a broader conspiracy which culminated in the unlawful sale of dynamite. This single transaction did not provide the wherewithal with which Koblinski, Cosnyka and Azzaretto sustained their dealing in explosives. It did not help to show the organization and structure of the broader conspiracy or the roles each individual played. Most importantly however, it had very little relevance if any to show an intent on the part of Koblinski to join in any conspiracy to sell dynamite. It would take more than a single transaction

involving the totality of the circumstance to legitimately infer that the accused herein intended to join a broader plan or scheme to sell and deal in dynamite.

Thus appellant argues that such evidence had no bearing on the substantive crime charged herein. That it was merely an isolated transaction which had no relevancy to the issue of his intent or his guilty or innocence. As such, the inclusion of such evidence only seemed to influence the jury and show the appellant's predisposition to commit a crime. There can be no dispute that inflammatory, irrelevant evidence and improper and inadmissible and under appropriate circumstances, its admission may constitute reversible error. Brandon v. United States, 431 F 2d 1391 (2nd Circuit) To be admissible, evidence must have some potential, probative weight upon issues under trial and may not be introduced merely to show a pre-disposition to commit a crime. United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976). It is thus the task of the Trial Judge to determine relevancy and to assess the potential prejudice to the defendant before admitting a particular piece of evidence. United States v. Catalano, 491 F 2d 268 (2nd Circuit 1974).

An important and critical element of a fair trial is that the jury consider only relevant and competent evidence

bearing on issue of guilt or innocence. Bruton v. United States, 88 S.Ct. 1620, 391 U.S. 123, 20 L Ed. 2d 476.

For the reason set forth hereinabove, the appellant contends that it was reversible error for the Trial Judge to admit evidence of his declaration and activity with regard to Railroad Torpedos, as it had no relevance to his intent or motive to join any conspiracy and further such evidence was so prejudicial that its admission denied him a fair trial.

CONCLUSION

Evidence was not relevant to crime as charged in indictment and should have been properly excluded.

B. Evidence was of such marginal relevance that it should have been properly excluded because of its prejudicial nature and its tendency to mislead and confuse the jury.
it

Rule §403 of the Federal Rules of Evidence 28 USCA reads as follows:

§403 - Exclusion of Relevant Evidence a Ground of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Law is quite clear that although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice to the right of the accused. United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965); United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976). Case Law and Statutory Law have long recognized that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risk which range from jury verdicts induced on a purely emotional basis, on the one hand, to jury verdicts based purely on characterization of the accused as a "bad Man". It is these extremes which Rule 403 seeks to address itself to. Thus Rule 403 providing that relevant evidence may be excluded if its probative value is substantially outweighed by prejudice or confusion of issues, is designed principally to promote a policy of assuring correct factual determination in individual cases and actual and perceived fairness in the judicial process as a whole. United States v. Robinson, 544 F 2d 611.

The overriding concern of the court in insuring a fair trial is that the jury is presented with only relevant and competent evidence bearing on the issue of guilt or innocence and that such evidence be probative, but not unduly prejudicial. Bruton v. United States, 88 S. Ct. 1620, 391 U.S. 123.

In determining the admissibility of evidence, the Trial Judge must balance the probative value of and need for the evidence against the harm likely to result from its admission. The Trial Judge must always be cognizant and protect against the high potential that such evidence may have for arousing the jury against the accused. He has a duty and obligation to exclude any evidence which has little or no relevance and which would more than likely prejudice the defendant or confuse and mislead the jury.

United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965); United States v. Ravich, 421 F 2d 1196 (2nd Circuit); cert. denied 400 U.S. 834 (1970); United States v. Robinson, 544 F 2d 611 (2nd Circuit). Where it is clear that the prejudicial nature of the evidence is substantial, its admission may constitute an abuse of discretion requiring a reversal. See United States v. DeCicco, 435 F 2d 478 (2nd Circuit 1970); United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965); United States v. Catalano, 491 F 2d 268 cert. denied 95 S.Ct. 42, 419 U.S. 825, 42 L.Ed. 2d 48, United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976).

Appellant Koblinski herein contends that certain testimony concerning his alleged declarations with respect to obtaining and supplying railroad torpedos to Agent Robert Izzo

was or marginal relevance with little, if any probative worth and thus should have been properly excluded. The prejudice engendered by the admission into evidence of these declarations and acts far outweighed its legitimate probative weight and therefore it was an abuse of discretion for the Trial Court to allow its admission even when accompanied by cautionary instructions to the jury.

Joseph Koblinski was originally charged with two counts of selling dynamite, one count of dealing in explosives without a license and one count of conspiring to deal in and sell explosives. The proof against Joseph Koblinski's involvement in any unlawful enterprise was very weak. The Government itself conceded that the question of appellant's guilt was certainly a close one. (See Government's memo in opposition to defendant's motion for Judgment of Acquittal Page 12).

In an effort to show proof of appellant's knowledge and intent to join and further the goals of the conspiracy charged herein, the government introduced testimony from one Agent Robert Izzo, who testified that appellant sold him one railroad torpedo and agreed to obtain and supply more railroad torpedos for sale. Appellant objected vehemently to the relevance

of this evidence and to the potential prejudice that could arise but the Trial Court allowed it cautioning the jury that it was being admitted for the limited purpose of showing appellant's intent and willingness to join in the conspiracy.

Prior to the case being submitted to the jury, the Trial Court dismissed County VII and Count X of the indictment for lack of proof. The jury thereafter returned a verdict of not guilty on the substantive count with regard to the sale of four sticks of dynamite, but found the appellant guilty of Count XIII, Conspiring to deal in and sell explosives.

Thus, while the jury found appellant innocent of the substantive count of selling dynamite, it felt there was sufficient evidence to support the charge of conspiracy. It would appear then, from a reasonable view of the facts, that the verdict was based for the most part on the testimony of Agent Izzo regarding the sale and supply of Railroad torpedos.

The admissibility of that testimony then becomes a very critical issue in that it appears it was the sole basis for the jury's determination of appellant's guilt or innocence. Thus, if as appellant contends, such testimony should have been properly excluded, then there can be no question that a reversal of appellant's conviction is warranted.

Such a verdict would further tend to support the conclusion that such evidence as was admitted did nothing more than confuse the jury and characterize the appellant as a "bad Man" with pre-disposition to commit a crime.

It is well settled that evidence of prior crimes or similar uncharged acts is customarily not admissible to show the disposition propensity or proclivity of an accused to commit the crime charged. Boyd v. United States, 14 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077 (1892); Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); United States v. Torres, 519 F 2d 723 (2nd Circuit); United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976). However, the courts have long recognized that suit evidence may be admissible to show the accused's knowledge, intent or motion to commit the crime charged. United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Catalano, 491 F 2d 268 (2nd Circuit) cert. denied 419 U.S. 855 (1974).

In order to be properly admitted, such evidence must be probative of the issue at trial and must be logically connected or relative to the crime charged in the indictment. United States v. Chestnut, 533 F 2d 40 (2nd Circuit 1976). It is clear that the probative value of such evidence is dependent on the

"existence of a close parallel between the crime charged and the acts shown'. United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Santiago, 528 F 2d 1130 (2nd Circuit).

In the case at hand, testimony regarding appellant's declaration and sale of Railroad torpedos established only a very weak inference at best that appellant had any intent to join in any conspiracy to deal in and sell dynamite. These acts and declarations were not crimes. There was no proof that the Railroad Torpedos were "explosives" as defined by Federal Statute or that they were in any way a necessary and integral part of the broader conspiracy to deal in dynamite. The record is void of any proof whatsoever that Koblinski's actions were in any way related to the crime charged in the indictment. Koblinski and his co-defendants were charged with selling and dealing in explosives, namely, stolen dynamite. It was never alleged either in the indictment or at the trial that Koblinski's declaration that he could supply Railroad Torpedos or that his single sales transaction with Agent Izzo was an "overt act" or a necessary and integral activity done in furtherance of the general conspiracy to sell and deal in dynamite. As such, it appears that there is lacking any significant connection between the crime charged and the act or declaration introduced for the

purpose of proving appellant's knowledge or intent. Absent such relationship, the probative value of such evidence is minimal and the better practice is to deny admissibility in view of its prejudicial potential. United States v. Leonard, 524 F 2d 1076 (2nd Circuit 1975); United States v. Santiago, 528 F 2d 1130 (2nd Circuit); United States v. Byrd, 352 F 2d 570 (2nd Circuit 1968).

Further, there was a real question as to whether the government was faced with a real necessity which required it to offer the evidence in its main case. It would appear from the record, that if the government offered such evidence to show Koblinski's intent to join the conspiracy, they had other evidence of intent which did not carry the prejudicial impact of the testimony with regard to the railroad torpedos. Testimony of other acts and declarations furnished ample evidence of any knowledge and intent which could have avoided the necessity of introducing the highly prejudicial evidence of the Railroad Torpedos. It is clear that in deciding whether to allow such evidence to be admitted, the Courts in weighing its probative worth must also consider the necessity of the government to introduce such evidence in its main case. Where it appears that there is sufficient independent evidence of intent or knowledge,

oē

the Trial Court should not allow such evidence which may prejudice the accused's right to a fair trial. United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965).

Therefore, in view of the questionable worth of such evidence and the likelihood that it had a significant prejudicial impact on the minds of the jury and under the circumstances of this exceedingly close case, it would appear that such evidence should not have been admitted even with the cautionary remarks. In view of appellant's acquittal on the substantive count of the sale of dynamite, there can be no question that the jury verdict was for the most part based on the admission of this prejudicial evidence. Granted that the Trial Court had broad discretion in admitting proof of similiar acts to show knowledge or intent to participate in a conspiracy. United States v. Natale, 526 F 2d 1160 (2nd Circuit 1975); United States v. Tramunti, 513 F 2d 1087 (2nd Circuit 1975) cert. denied 423 U.S. 832 (1975); United States v. Papadakis, 510 F 2d 287 (2nd Circuit) cert. denied 421 U.S. 950 (1975), but its overriding concern should be guaranting the accused a fair trial and that involves a fair appraisal and balancing of the possible prejudice on the jury if such evidence is admitted for such a limited purpose. The Trial Court is not immune from accountability and where it is clear as it is in this

case that evidence of similiar acts or declarations have little, if any, relevance and where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it is slight, its admission even for the limited purpose of showing knowledge or intent is a clear abuse of discretion requiring a reversal.

United States v. Byrd, 352 F 2d 570 (2nd Circuit 1965) (proof of prior unrelated fraudulent transaction not admissible as evidence of intent); United States v. Catalano, 491 F 2d 268 cert. denied 95 S.Ct. 42, 419 U.S. 825, 42 L.Ed. 2d 48, (2nd Circuit 1974) (proof of gambling trip allegedly made by accused under assumed name not admissible to show intent to avoid taxes); United States v. Robinson, 544 F 2d 611 (2nd Circuit 1976) (proof that .38 caliber hand gun found in accused's possession at time of arrest not admissible); United States v. DeCicco, 435 F 2d 476 (2nd Circuit 1970) (proof of prior transactions not admissible to show intent).

CONCLUSION

Evidence of actual declaration with respect to Railroad Torpedos was of such marginal relevance that it should have been properly excluded because of its prejudicial nature.

POINT II

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE JURY'S VERDICT THAT THE APPELLANT WAS GUILTY OF CONSPIRACY

The Crime of Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act or to do a lawful act by criminal or unlawful means. Jianelli v. United States, 95 Sct. 1284, 420 U.S. 770, 43 LED 2d 616.

In order to sustain a conviction for conspiracy, the government has the obligation to establish beyond a reasonable doubt, that each member of the conspiracy had the deliberate knowing and specific intent to join in the illegal venture and to further some objective or purpose of the conspiracy. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.ED. 128; United States v. Torres, 503 F 2d 1120, (2nd Circuit 1974); Miller v. United States, 382 F 2d 583. There must be a showing that each member had a stake in the venture and through his actions intended to further, promote and cooperate in the goods and objectives of the conspiracy. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128; United States v. Ciachetti, 315 F 2d 584 (2nd Circuit 1963).

It is appellants contention herein that there was

insufficient evidence to warrant the conclusion that he entered, participated or furthered the conspiracy. Appellant makes no argument herein that a conspiracy to deal in and sell explosive material existed or that he had knowledge of its operation, but he categorically denies that he ever joined, participated or cooperated in furthering any of its goals or objectives.

The government presented testimony that beginning on or about the 12th day of February, 1975 and continuing through the 6th day of June, 1975, several individuals named in the indictment were engaged in the business of dealing and selling explosive material to wit: Stolen dynamite.

The government's case rested on the testimony of Special Agent Robert F. Izzo and co-defendant, Phillip Azzaretto. As to the appellant, Joseph Koblinski, the co-defendant, Phillip Azzaretto admitted that he never had any contact or dealings with the appellant and was unaware of any involvement or participation in any activity as it related to the sale of explosive materials pursuant to the indictment. Special Agent Robert F. Izzo testified that on April 14, 1975, he engaged co-defendant, Thaddeus Cosnyka, Jr., in a conversation relating to the sale of dynamite. He agreed to meet Cosnyka at his residence at 148 Ridge Road, Lackawanna, New York. At that

meeting Cosnyka introduced Izzo to the appellant, Joseph Koblinski. Izzo testified that at that time he asked Cosnyka if he had any blasting caps available in addition to the dynamite and appellant Koblinski told him he had railroad torpedos. Izzo then asked appellant Koblinski if he could secure more torpedos and Koblinski responded by saying he could obtain some more if necessary. Except for the one torpedo sold to Agent Izzo, there was no further sale or delivery of any railroad torpedos by appellant.

Izzo then testified about various conversations he had with Cosnyka between April 14, 1975 and June 5, 1975 which resulted in Izzo going to Cosnyka's home on the latter date. He testified that at that time Koblinski was again present while he and Cosnyka negotiated a sale to be consummated the next day. At this point Cosnyka said that if he was not there the next day, Izzo could deal with Koblinski. Agent Izzo then testified that he asked Koblinski if he knew about the dynamite sale and Koblinski said he was "cool". Izzo further testified that the next day he returned to Cosnyka's residence and that while he and Cosnyka were engaged in a conversation, the telephone rang. Izzo then claimed he took the phone and recognized the voice on the other end as being Koblinski. Izzo then claimed that

Koblinski advised him that dynamite had been placed in a cigar box under the back steps of a house in front of Cosnyka's residence.

Upon cross-examination by defense counsel, Special Agent Izzo readily admitted that he had no previous contact with the appellant, Joseph Koblinski prior to the April 14 meeting and that there had never been any direct sale of dynamite or collection of money for such sale by the appellant, Joseph Koblinski. Agent Izzo further admitted that there were never any pre-arranged meetings or contacts with the appellant, Joseph Koblinski; that each time he saw the appellant at Cosnyka's residence, it was merely by chance.

Co-defendant, Thaddeus B. Coznyka, testified that Joseph Koblinski was never involved in any scheme with regard to the sale of explosive materials and that his involvement was totally innocent and only as an accomodation to him.

The Supreme Court has held that the existence of a criminal conspiracy need not be proven by direct evidence; a common plan may be inferred from circumstantial evidence. Glasser v. United States, 315 U.S. 60 (1942). However, while it is true that the proof may be circumstantial, it still must be such that it proves beyond a reasonable doubt that a

conspiracy existed, that the appellant knew it and with that knowledge intentionally did some act or thing to further or carry on that conspiracy. United States v. Torres, 503 F 2d 1120 (2nd Circuit 1974). Additionally, despite the rule that once a conspiracy is shown to exist, slight evidence is all that is required to connect a particular defendant with the conspiracy, the proof must be individual and personal and the government must still "prove beyond a reasonable doubt that each member of the conspiracy had the deliberate, knowing and specific intent to join the conspiracy." United States v. Torres, 503 F 2d 1120 Supra; United States v. Freie, 545 F 2d 1217 (9th Circuit 1970).

Appellant contends that even though his involvement in the conspiracy can reasonably be inferred from circumstantial evidence and despite the slight evidence rule, the facts are still too weak to support the necessary inferences to his individual participation beyond a reasonable doubt. The facts are clear that there was no contact with Agent Izzo prior to the April 14 meeting and Agent Izzo readily admitted that he never had any direct sale negotiations with appellant and never had any pre-arranged meeting with Koblinski in any regard. There was no proof that appellant had any stake in this venture or

that he derived any benefit from his action therein. In order to support the verdict herein, there must be some proof that the appellant in some sense promoted the goal of the scheme or plan, making it his own. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128; United States v. Ciachetti, 315 F 2d 586 (2nd Circuit 1963); United States v. Torres, supra.

The government will argue that appellant's declaration with respect to obtaining and supplying railroad torpedos, and his act of selling Agent Izzo one railroad torpedo would indicate his motive and intent to join in the unlawful enterprise. The Law is quite clear that a mere single transaction is not sufficient to draw an action within the ambit of a conspiracy to violate Federal Law. United States v. Sperling, 506 F 2d 1323; United States v. Santore, 290 F 2d 51 (2nd Circuit 1960); United States v. DeNoia, 451 F 2d 979 (2nd Circuit 1971). Further, mere willing participation in acts with alleged co-conspirators knowing in a general way that their intent was to break the Law is insufficient to establish a Conspiracy. United States v. Falcone, supra; United States v. Purin, 486 F 2d 1363.

Thus, the fact that Koblinski sold one Railroad Torpedo to Agent Izzo and had a general knowledge of some criminal activity on the part of defendant Cosnyka, is not sufficient to establish

that he was an active, willing participant in a scheme to deal and supply explosive material to wit: stolen dynamite. Further, the fact that he was present at several meetings with co-defendant [redacted] and Agent Izzo does not in itself support the inference of active participation in any conspiracy. United States v. Sisca, 503 F 2d 1337 (2nd Circuit 1974); United States v. Stewart, 451 F 2d 1203 (1971); United States v. Kearse, 444 F 2d 62 (1971).

Thus, given the evidence at fullest force, it amounts to no more than the defendant was associating with persons of questionable character and had knowledge of some illegal activity. The appellant's connection it appears then was based more on mere suspicion and speculation rather than competent evidence actually linking him with criminal conspiracy. The Law is quite clear that mere association without more does not suffice to support a conviction on conspiracy. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204 85 L. ED 128; United States v. Torres, 503 F 2d 1120 (2nd Circuit 1974); United States v. Kompinski, 373 F 2d 429 (2nd Circuit 1967).

Further, even where there is evidence as in this case that the defendant had knowledge of the existence of a conspiracy or had contacts with others involved in a conspiracy, it is not sufficient without more to sustain a conviction. United States v.

Torres, 503 F 2d 1120 (2nd Circuit 1974); United States v. Ciachetti, 315 F 2d 584 (2nd Circuit 1963); United States v. Kompinski, 373 F 2d 429 (2nd Circuit 1967); United States v. Purin, 486 F 2d 1363 (2nd Circuit 1970).

Although association with or contacts with co-conspirators may raise a strong suspicion of knowledge and intent, this was not the only reasonable inference which may be derived from Appellant Koblinski's declarations and actions herein. Any contacts between Koblinski and other co-defendants must be presumed innocent unless circumstances indicate otherwise. United States v. Kompinski, 373 F 2d 429 (2nd Circuit 1967).

A case perhaps factually similar to this where the Court overturned a conviction of conspiracy is United States v. Steinberg, 525 F 2d 1126 (2nd Circuit 1975). The question there was whether or not there was sufficient evidence to support the jury verdict finding the co-defendants, one Kaye and Parker, guilty of conspiracy. The indictment there contained several counts charging co-defendants, Kaye and Parker, with conspiracy to deal and sell illicit drugs. The evidence against Kaye was that he was acquainted with co-defendant Steinberg, who was the central figure in a drug ring. Steinberg allegedly called Kaye requesting a supply of cocaine. Kaye stated he could obtain some

and agreed to do the transaction. Kaye later decided not to get involved and disassociated himself from venture. Parker was a known drug user, who was also associated with Steinberg. The proof showed that he visited Steinberg's residence several times and one time purchased a small quantity of drugs from Steinberg.

Under these facts, the Court found that there was no fixed agreement to participate in the conspiracy. The proof, the Court stated, demonstrated little more than that these individuals were friend and fellow drug users.

Here the facts show that Koblinski was present on several occasions, had conversations with Agent Izzo with regards to future sale of railroad torpedos (which were not shown to be an explosive as defined by Federal Statute) and allegedly had a phone conversation with Izzo about the location of a cigar box containing dynamite. This proof like the proof against co-defendants Kaye and Parker, did little more than show that Koblinski was a friend of Cosnyka and offered to do him a favor. There was no proof that Koblinski was actively involved in dealing and selling explosives. Both co-defendants, Cosnyka and Azzaretto, readily admitted that Koblinski was not involved in any activity with regards to the sale of dynamite and Special

Agent Izzo himself admitted that except for the sale of the railroad torpedo, which was not considered an explosive, there was never any discussion, negotiation, sale or other contact with Koblinski with regards to dynamite or any other explosive materials.

Appellant contends that unless the totality of the evidence is sufficient to show a concert of action, all parties working together; understandingly, with a single design for the accomplishment of a common purpose, conspiracy cannot be found. United States v. Prout, 526 F 2d 380 (5th Circuit 1963).

Mere knowledge, approval, or acquiescence in object of conspiracy without agreement to co-operate in achieving such object and purpose does not make one a party to a conspiracy. United States v. Downen, 496 F 2d 314; cert. denied 95 S.Ct. 177, 419 U.S. 897, 42 L.Ed. 2d 142; United States v. Hassell, 547 F 2d 1048; United States v. Kompinski, 373 F 2d 429 (2nd Circuit 1967); United States v. Steinberg, 525 F 2d 1126 (2nd Circuit 1975).

Thus where as in this case, the defendant's participation in the conspiracy was allowed to go to the jury on the meager and unsubstantiated proof introduced in this case, it was an invitation to the jury to return a conviction based entirely on association. Where as here the record revealed that the

evidence of guilt is so tenuous that it is speculative and there is little more than a mere suspicion of defendant's guilt, a verdict of guilty cannot and should not stand. United States v. Stroyce, 538 F 2d 1063. It is clear from the evidence that the links between Cosnyka and Koblinski were so tenuous that making all reasonable inferences and credibility choices as will support the guilty verdict, the Court must and should conclude that no reasonable mind could find guilty beyond a reasonable doubt.

CONCLUSION

Evidence of Appellant's declarations and Sale of Railroad Torpedos was not relevant to crime charged in the indictment and as such should have been properly excluded. That even if such evidence can be said to be relevant on the issue of knowledge or intent, such relevance was marginal and its prejudicial nature far outweighed its probative weight so that its admissibility on such issue was an abuse of the Trial Court's discretion necessitating a reversal or a new trial.

Respectfully submitted,

PETRICCA AND PERFETTO
Attorneys for Appellant
Office and P. O. Address
605 Ridge Road
Lackawanna, New York 14218

APPENDIX

	<u>Pages</u>
Relevant Docket Entries	A-1
Selections from Memoranda in Opposition to Defendant's Motion for Judgment of Acquittal ...	A-2
Selections from Transcript	A-3
Index to Record on Appeal	A-15

PAGINATION AS IN ORIGINAL COPY

RELEVANT DOCKET ENTRIES

Date

6/26/75	Indictment No. 75-148 filed.
6/27/75	Defendant arraigned.
7/11/75	Defendant's notice of motion for bill of particular filed.
8/8/75	Government's Bill of Particulars filed.
3/16/76	Government's Motion to move action for trial filed.
9/26/77	Motion by defendant to dismiss the indictment. Motion denied.
10/4/77	Trial commenced before Honorable John T. Curtin and Jury.
10/5/77	Trial continues.
10/6/77	Trial continues.
10/7/77	Jury return verdict of guilty on Count XIII.
10/13/77	Defendant's motion for Judgment of Acquittal or, in the alternative, a new trial and memorandum in support of motion filed.
10/27/77	Oral argument held in motion for judgment of acquittal. Motion denied.
11/17/77	Defendant is sentenced to two year probation.
11/22/77	Judgment and Probation Order for Defendant filed.
11/28/77	Defendant's Notice of Appeal filed.

Cosnyka, Jr. with the substantive count of selling four sticks of dynamite in violation of the law. Prior to the case being submitted to the jury, this Court dismissed Count VII as to this defendant which was a charge of dealing in dynamite without a license and Count X, which charged this defendant with sale of four sticks of dynamite on April 14, 1975.

The defendant now claims that the evidence was insufficient to sustain the jury's verdict of guilty on the conspiracy count. The Government concedes that the question is certainly a close one. The gist of conspiracy is, of course, the agreement or plan and the question is whether or not Koblinski knew of the plan as opposed to being merely associated with co-defendant, Thaddeus B. Cosnyka, Jr.

In viewing the evidence in a light most favorable to the Government and all the inferences reasonably drawn therefrom, a reasonable jury could reasonably conclude guilt beyond a reasonable doubt, the standard for deciding the issue of sufficiency of evidence in this Circuit. See, e.g., United States v. Fahey, 510 F.2d. 302, 305 (2d. Cir. 1974); United States v. Brawer, 482 F.2d 117, 125, 127 (2d. Cir. 1973), cert. denied, 419 U.S. 1051 (1974).

1 desire to make a motion?

2 MR. MICHALEK: Yes, your Honor.

3 THE COURT: The Government has rested.

4 MR. MICHALEK: Your Honor, pursuant to the proof
5 that has been offered in behalf of Mr.
6 Czosnyka we would move to dismiss the
7 indictment on the grounds that the People
8 or the Government has failed to prove a
9 prima facie case in that there is
10 insufficient evidence as a matter of law
11 to convict Mr. Czosnyka of any of the
12 indictments as put forth. Thank you,
13 your Honor.

14 THE COURT: Mr. Perfetto.

15 MR. PERFETTO: At this time, your Honor, I would
16 like to make a motion to dismiss on the
17 grounds that the People have failed to
18 prove a prima facie case as far as my
19 client is concerned. As you know, your
20 Honor, my client is charged with four
21 counts in the indictment. The first count
22 is one dealing without a license; two, on
23 the 14th day of April that he did sell
24 four sticks of stolen dynamite and on the
25 6th, Count 12, that on the 6th day of June

1 he sold four more sticks and then in
2 Count 13 which is the catch-all clause,
3 the conspiracy, and all the testimony as
4 you recall in regards to Agent Izzo,
5 your Honor, I went into detail in regards
6 to the 20th of February of '75 until the
7 6th day of June in regards to my client
8 either buying or talk about buying or
9 selling in regards to it. No testimony
10 whatever did he have any negotiations
11 with Agent Izzo or any other agent as
12 far as the dynamite is concerned. Also,
13 Agent Izzo infallibly denied even on the
14 14th day of April which is Count 10,
15 that he was buying or selling from my
16 client Mr. Koblinski on that date and
17 also on the 6th day of June, your Honor,
18 the testimony, and I won't go into great
19 detail in regards to the 5th when he was
20 negotiating with Czosnyka as far as
21 having it delivered and so forth, my
22 client happened to be present in regards
23 to it where Mr. Czosnyka says, "Well, if
24 I can't be there then maybe Mr. Koblinski
25 will do this for me as far as that as a

1 good samaritan is concerned". I mean
2 the evidence is so slight in regards to
3 it that I mean, he being there, if this
4 was a situation, your Honor, that my
5 client even on the 14th day of April
6 knew that there was going to be a meeting
7 with Mr. Czosnyka or with Mr. Izzo in
8 regards to it, I would say it, but he
9 happened to be there. He works on cars
10 there. There was no planned meeting by
11 Agent Izzo to be there that day and in
12 fact I even brought out the fact that
13 Agent Izzo was quite shocked that my
14 client was there that day and talking to
15 Czosnyka. He stated, you know, could he
16 deal and so forth and Czosnyka told him
17 it was all right, that he was a friend of
18 his and also even on the 5th day a person
19 saying, "Well, if my buddy or friend
20 can't do something for you in regards to
21 it I will do it", which he didn't end up
22 doing anyway. He didn't need him on the
23 6th or anything else in regards to it to
24 take the money or to deliver the dynamite.
25 I mean there really, your Honor, is no

1 evidence whatsoever in regards to any of
2 these charges and I feel the Court should
3 dismiss the case against my client.

4 Thank you.

5 THE COURT:

Mr. Williams.

6 MR. WILLIAMS:

7 Your Honor, with respect to the
8 defendant, Czosnyka, it seems to me there
9 is certainly more than ample testimony
10 both from Agent Izzo and co-defendant,
11 Azzaretto with respect to his involvement.
12 I think clearly it is a jury question. I
13 agree with respect to defendant Koblinski
14 it is a much more troublesome situation.
15 We have no question that co-defendant
16 Azzaretto had no contact with Koblinski
17 or dealings with Koblinski relative to
18 the charges of this indictment that deal
19 with dynamite but Agent Izzo testified
20 about conversations that he had with
21 Koblinski and about a telephone call that
22 he had on June 6th of 1975 wherein he
23 related that in his opinion after having
24 talked to Koblinski for, I think he said
25 at least two or three, maybe four prior
occasions for a period of time, that he

1 recognized the voice on the other end
2 as being Koblinski who said that he
3 dropped off the package or the package
4 of dynamite was under the back steps of
5 the front house at 678 Ridge Road and
6 that Koblinski was present at, - along
7 with Czosnyka and him on June, - I think
8 it was on June 5th when they discussed
9 the deal for the next day. I think
10 certainly at least as it relates to the
11 sale on June 6th that there is sufficient
12 evidence to go to the jury on Koblinski.

13 THE COURT:

On June 6th?

14 MR. WILLIAMS:

Yes.

15 THE COURT:

What about all the dates?

16 MR. WILLIAMS:

Well, perhaps the easiest way is
17 to - -

18 THE COURT:

Take it count by count.

19 MR. WILLIAMS:

Yes. I was going to say perhaps
20 that is the easiest way, going through
21 count by count. Count 7 charges the
22 three of them, and of course, we are
23 no longer concerned with Azzaretto,
24 between certain periods of time, all
25 dealing with dynamite without a license.

H. T. Noel & E. F. Knisley

OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 It also charges a violation in addition
2 to the substantive violation, it charges
3 violations specifically of Section 2.

4 I think at least again with respect to
5 the sale of June 6th that the evidence
6 certainly suggests that as a minimum,
7 Koblinski aided and abetted in that
8 particular sale. I just want to go back
9 to the 14th of April for a moment.

10 THE COURT:

Mr. Williams, can we take them one
11 at a time and can you put on the record,
12 please, what testimony you have to link
13 Koblinski to each one of these days.

14 MR. WILLIAMS:

Yes, your Honor.

15 THE COURT:

16 Instead of skipping from one to the
17 other let us just start with the first
18 one. What is the first one, the 14th of
April?

19 MR. WILLIAMS:

20 Well, the first count of the indict-
21 ment alleges the dealing between these
22 periods of time from February 20th until
23 June 6th. Since that is the first count
24 I am starting with that one. If I could
25 just have a moment. Well, with respect
to Count 7 which charges the dealing

1 between that period of time we certainly
2 have Izzo's testimony about what Koblinski
3 did on June 6th, the conversation he had
4 June 5th which led up to the events of
5 June 6th and what he did on June 6th.
6 I think before arguing any further I
7 think a lot depends, - we had some
8 testimony through Izzo about the fact
9 that he had other conversations with
10 Koblinski about getting dynamite caps
11 and torpedos. Now, if we can, - if that
12 is considered, if the Court considers
13 that as some evidence of the defendant's
14 state of mind, willingness to engage in
15 this kind of activity, I think that has
16 a bearing upon whether or not on some
17 of these counts it is a jury question or
18 not.

19 THE COURT:

We permitted some of that and we
struck the continuing, when we get into,
for example, about what the source was.

22 MR. WILLIAMS:

Right, but with respect to the
testimony we have had. - -

24 THE COURT:

Can we take one count and you tell
me all of the evidence that you believe, -

1 you will have to sum up sometime.

2 MR. WILLIAMS:

Right.

3 THE COURT:

4 I do not mean a summation but tell
5 me all the evidence you believe you had
6 on any one count. Let me have the file,
7 please.

8 MR. WILLIAMS:

9 All right. On Count 7 which charges
10 the dealing we have the testimony from
11 Izzo relating, Number 1, to conversations
12 that he had with both Koblinski and
13 Czosnyka wherein, for example, on April
14 14th, '75 he testified about Koblinski
15 when he was discussing dynamite with
16 Czosnyka that Koblinski told him that he
17 had dynamite caps available; that he had
18 some torpedos available. He had a
19 further conversation, - that is, Izzo
20 testified about a further conversation
21 that he had with Koblinski dealing in
22 other kinds of explosives like dynamite
23 caps and railroad torpedos on April 19th.
24 Also - -

25 THE COURT:

Of course, you have all of the
other evidence, Mr. Williams, about how
the dynamite was transferred during this

1 period of time and whether Koblinski
2 had any, - offered any assistance as far
3 as the moving of the dynamite because
4 this is the business count, whether they
5 were engaged in business.

6 MR. WILLIAMS:

In terms of the assistance, your
7 Honor, in terms of assistance in that
8 aspect that would simply be on June 6th
9 of 1975 where, according to the testimony,
10 he was the one that delivered the dynamite
11 and left it under the back - -

12 THE COURT:

Of course, that is what I want you
13 to do. That can be considered, I believe,
14 as to this count. Tell me. I have to
15 drag it out of you.

16 MR. WILLIAMS:

I am sorry.

17 THE COURT:

Put it all out on the table. What
18 evidence do you have as to each count
19 in your view?

20 MR. WILLIAMS:

In my view, your Honor, with respect
21 to Count 7 in addition to these conversa-
22 tions about dealing generally, specifically
23 we have on June 6th the fact that
24 Koblinski delivered a cigar box containing
25 four sticks of dynamite and according to

1 the testimony of Agent Izzo, he had
2 placed it under the rear steps of the
3 front house. That is, the house in front
4 of Czosnyka's on that particular day and
5 in the indictment as I say, in addition
6 to the substantive count charges aiding
7 and abetting and I certainly think that
8 constitutes proof of aiding and abetting.

9 THE COURT:

All right. Let us go on to Count 8.

10 MR. WILLIAMS:

We are not concerned with Count 8.

11 THE COURT:

The next count is Count 10.

12 MR. WILLIAMS:

We go on to Count 10.

13 THE COURT:

14 This is the 14th of April. Tell me
15 all the evidence you have about Koblinski
16 on the 14th of April.

17 MR. WILLIAMS:

18 Your Honor, with respect to the 14th
19 of April I think a fair reading of the
20 evidence indicates that it is not a jury
21 question. I think I would concede that.

22 THE COURT:

23 All right. That is what I am trying
24 to get at.

25 MR. WILLIAMS:

Yes.

THE COURT:

This is the thought I had here and
I just want you to tell me so we do this
fairly.

1 MR. WILLIAMS:

I understand. With respect to
2 Count 10, I concede it is not a jury
3 question.

4 THE COURT:

We will dismiss Count 10.

5 MR. WILLIAMS:

6 With respect to Count 12, your
7 Honor, that charges the sale on June 6th
8 of 1975. Again, I went over the testi-
9 mony as it relates to what happened on
10 June 5 and June 6th and I think there
11 under the circumstances that is clearly
12 a jury question with respect to that sale.
13 On the Count 13, your Honor, the conspiracy,
14 I think that under the circumstances
15 again I don't think we have sufficient
16 evidence for the jury as it relates to
17 the defendant Koblinski on that particular
18 count and I would move to dismiss that
count as it relates to Koblinski.

19 THE COURT:

20 Very well. I will dismiss Count 10.
21 As to the other counts, Counts 13, 12
22 and Count 7, they will remain as to
23 Koblinski and I will also, as far as
24 defendant Czosnyka is concerned, I will
25 deny your motions to dismiss on all
counts as to Mr. Czosnyka.

1 MR. PERFETTO:

May I say a little bit more, your Honor, in regards to this? He is bringing in again in regards to doing business on Count - -

2
3
4
5 THE COURT:

I know what the problem is. What I am going to say to you now - -

6
7 MR. PERFETTO:

Yes.

8 THE COURT:

Is for the present time I am going to deny the motion.

9
10 MR. PERFETTO:

Yes.

11 THE COURT:

We can take it up again at the end of the proof. Furthermore, Mr. Williams, as far as we do have this business during the, as I get Izzo, during the discussion about dynamite and so forth, there were these other discussions about the caps, torpedos and so forth. I would want from you a suggestion and also from you after you have looked at the Governments suggestion as to how this should be handled as far as the charge, as part of the jury charge. It is not part of the indictment in the case and the only way it could be considered is to determine what his state of mind is.

**UNITED STATES DISTRICT COURT
SECOND CIRCUIT**

UNITED STATES OF AMERICA

Plaintiff - Appellae

vs.

Index

JOSEPH KOBLINSKI

Defendant - Appellant

INDEX TO RECORD ON APPEAL

- 1. Indictment**
- 2. Judgment and Commitment Order**
- 3. Notice of Appeal**
- 4. Demand for Bill of Particulars**
- 5. Government Response to Bill of Particulars**
- 6. Motion for Judgment of Acquittal**
- 7. Memoranda in opposition of Motion of Acquittal**